DRAFT

Ohio raised the question during the call last Thursday regarding potential Fourth Amendment violations caused by criminalization of a permitted party's denial of entry to an inspector under Ohio Revised Code §903.08 and §903.12. Ohio's concern with the proposed legislative language here is that it may be interpreted as an absolute denial of an individual's ability to exclude government inspectors from their property akin to granting the execution of warrantless searches. Although such an interpretation is not unfounded, the proposed legislative language should be read only to create a duty for parties permitted under state and NPDES programs to allow inspection pursuant to those permits. This duty alone does not grant an absolute right of entry to inspectors, but merely establishes criminal liability in line with NPDES enforcement provisions. This response is not an exhaustive analysis of the issue, but it provides necessary assurances that such action is within the Ohio legislature's authority, and does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Based on the analysis below, CWA authority in §308 and §309, and EPA's regulations found at 40 CFR 122.41, 123.26 and 123.27, There is no constitutional prohibition on imposing criminal fines when a regulated entry denies entry to an inspector. Having such authority does not preclude the State from seeking a warrant when entry is denied.

1. Warrantless searches are not presumptively unreasonable within industries highly subject to inspection and regulation.

Assuming *arguendo* that the proposed language would grant inspectors authority to conduct warrantless searches, such searches are generally unreasonable under Fourth Amendment jurisprudence. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 307 (1978). However, there is an exception to presumption of unreasonableness when the authority to inspect is applied to industries or businesses "long subject to close supervision and inspection." *Marshall, 436 U.S. at 307* quoting *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970). This exception is based on the idea that there is a diminished expectation of privacy when a citizen enters into a business or activity she knows is subject to government regulation and inspection. *Marshall* 436 U.S. at 313. "When an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulations." *Id.*

2. Licensing and permitting requirements are indicative of industries with diminished expectations of privacy.

Dicta from both the *Marshall* opinion and *Colonnade Catering Corp v. United States*, 397 U.S. 72 (1970) suggest that permitted and licensed activities are indicative of industries subject to diminished expectations of privacy. *Marshall* especially discusses the fear of general warrants that motivated and informed the framers of the Fourth Amendment. These concerns are used as support for the principle that permitted activities include a reduced expectation of privacy compared to non-permitted activities. Accordingly, permitted pollutant dischargers should have a diminished expectation of privacy with regard to their permitted activities because they bear all the indicators of a highly regulated activity.

3. Criminalizing refusal of inspection is less suggestive of a violation of Fourth Amendment guarantees than a warrantless search.

Cases leading up to the decision in *Marshall* highlight the difference between an outright warrantless search, and penalizing a refusal of inspection. In *Camara v. San Francisco*, 387 U.S. 523 (1967) the Court found that imposing criminal sanctions on the refusal of residential

building inspections violated the Fourth Amendment because it effectively removed an individual's ability to exercise their rights of privacy. One key point from that case was that the inspection statute in question applied uniformly to all homes within its jurisdiction, and not to any sort of permitted activity. *Colonnade* involved a licensed liquor dealer. Although the Court in *Colonnade* spoke specifically of the liquor industry, dicta from that case incorporates arguments that apply to any regulated industry falling within the "highly regulated industry" exception to presumptively unreasonable warrantless searches. The *Colonnade* Court explained that Congress has broad authority to fashion standards of reasonableness for searches of regulated entities. Criminalizing a licensee's refusal to admit an inspector is within that authority, and does not violate the reasonableness standards of the Fourth Amendment. "Congress has broad authority to fashion standards of reasonableness for searches and seizures...It resolved that issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to an inspector." *Id.* at 77. Footnote 18 in *Marshall v. Barlow's* uses the Clean Air Act's provision allowing district courts to force inspection compliance through injunctive relief (injunction of the permitted but not inspected activity) or recovery of a penalty as an example of a permissible way to respond when inspectors are turned away by regulated entities. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 322 (1978) citing 42 U.S.C. § 7413(b)(4) (1976 ed., Supp. I). An inspection of permitted facilities is not unreasonable because permitted parties consent to allow inspection of their facilities as part of the permit application process. A permitted party has no reasonable expectation that they will be able to refuse compliance with the terms of their permit. Therefore, legislative adoption of criminal sanctions for refusal to comply with NPDES permit inspections does not violate the Fourth Amendment's prohibition on unreasonable searches.

4. *United States v. Litvin*

United States v. Litvin, gives another example of a court approving a statutory penalty for refusal of inspection by an entity subject to regulation. *United States v. Litvin*, 353 F. Supp. 1333 (DC Cir. 1973). *Litvin* deals with a warehouse manager who refused to allow inspectors to examine his facilities under authority granted by the Food, Drug and Cosmetic Act (FDCA). The relevant section of the FDCA contains language that authorizes inspectors to a) enter and b) inspect facilities under the scope of the FDCA at "reasonable times." 21 U.S.C.A. 374(a)(1) (West 2013). The court found that a refusal to allow inspection violated the terms of the FDCA. The language found in the section of the Clean Water Act that authorizes inspection and monitoring of permitted entities is similar to that used in section 745(a)(4) of the FDCA. *See* 33 U.S.C. 1318(B)(i)-(ii). It follows that a refusal of inspection for an NPDES permitted facility would violate the terms of the Clean Water Act, specifically, section 308(a)(B)(i)-(ii). The *Litvin* court found no problem with imposing a monetary fine for a statutory violation caused by refusal of inspection, and the *Marshall* Court has no apparent qualms with imposing penalties as a means to encourage statutory compliance. Therefore, it is reasonable that courts would not take issue if the Ohio legislature imposed a criminal fine on those who refuse to admit inspectors pursuant to their NPDES permit.

Based on the above analysis, EPA believes it is appropriate and reasonable for Ohio to implement penalties for refusing to allow inspectors to enter facilities subject to NPDES permitting obligations. While EPA will not require this as a condition of approving the transfer

of Ohio's CAFO program to the ODA, EPA nevertheless strongly urges Ohio to include criminal penalties for refusing to allow such inspections.